**SHAW MING JEONG FRANK**

**v.**

**BANQUE INDOSUEZ**

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[IN BANKRUPTCY NO. 2874 OF 1986]
15 DECEMBER 1989

***CIVIL PROCEDURE:*** *Order 45 r. 11 of the Rules of the Supreme Court 1980 [Sing] - Principles applicable in granting stay of proceedings/execution on account of matters occurring after judgment or order - Test to be applied.*

The judgment creditor brought these bankruptcy proceedings against the debtor on account of a judgment obtained by the creditor against the debtor ("the judgment"). Adjudicating and Receiving orders were made. The debtor thereafter applied to have these orders annulled and rescinded on the grounds that he had not been properly served with the bankruptcy notice and on the ground that s. 5(1)(b) of the Bankruptcy Act had not been complied with. The judgment creditor consented to the debtor's application and taxed costs of about $9,000 became payable by the creditor to the debtor ("the costs order").

Thereafter the debtor filed another proceeding against the creditor claiming damages for malicious prosecution in relation to the bankruptcy proceedings. At the same time, the debtor also obtained an order to stay execution and other proceedings under the judgment ("the stay order") on the ground that he had a claim against the creditor.

The creditor applied to the Court under O. 45 r. 11 of the Rules of the Supreme Court ("r. 11") read with O. 88A of the Bankruptcy Act to stay all execution and other proceedings under the costs order on the ground that it would not be equitable if the debtor could enforce the costs order whilst the creditor was not allowed to enforce the judgment.

The Senior Assistant Registrar dismissed the application for stay of the costs order. The creditor appealed.

**Held:**

**[1]** Applying *London Permanent Benefit Building Society v. De Baer and Sal Leasing (Pte) Ltd. v. Hendmaylex Pte. Ltd.* that the Court's power under r. 11 of the Rules of the Supreme Court 1980 is restricted to any matter occurring since the date of the relevant judgment or order against which relief is asked, which, if it had occurred on or before the date of the judgment or order would or might have led to the grant of such relief.

**[2]** The next question to consider is whether it was possible for the stay order to have occurred before the costs order so as to prevent the costs order being made, or if made, to lead to a stay of the execution of the costs.

**[3]** It is within the realm of possibility that if the debtor had commenced the action for damages before he was adjudged a bankrupt, he might have obtained a stay of further proceedings in the bankruptcy petition - in this event the costs order would never have been made. This means that the stay order would have prevented the making of the costs order - the test in (1) above has been satisfied.

*[Appeal allowed.]*

**Cases referred to:**
*London Permanent Benefit Building Society v. De Baer [1968] 1 All ER 372*
*Sal Leasing (Pte) Ltd. v. Hendmaylex Pte. Ltd. [1987] 2 MLJ 307*

**Legislation referred to:**
Bankruptcy Act [Sing], ss. 5(1)(b), 88A
Rules of the Supreme Court [Sing], O. 45 r. 1, O. 45 r. 11

*For the appellant/creditor - Scott*
*For the respondent/debtor - K.S. Chung (Ms. D'Silva with him)*

**JUDGMENT**

**Chan Sek Keong J:**

This is an appeal by the judgment creditor ("the creditor") against the decision of the Senior Assistant Registrar dismissing its application for a stay of execution and all further proceedings on an order of costs made on 27 October 1988 ("the costs order") in these bankruptcy proceedings against the creditor. The costs order was made when the creditor consented to the annulment and rescission of adjudication and receiving orders made against the debtor on 4 September 1987 in these bankruptcy proceedings.

The background events are as follows:

(1) the creditor obtained judgment ("the judgment") in the sum of $858,289.85 and interest in OS No. 1515 of 1985 on 17 February 1986; the amount owing was secured by a mortgage of the debtor's house; the house was sold by the creditor as mortgagee on 1 August 1988 at the price of $1 million; after off-setting the proceeds of sale, the balance remaining due under the judgment was about $120,000;

(2) prior to the sale of the property, the creditor had commenced bankruptcy proceedings against the debtor: both the bankruptcy notice (issued on 11 August 1986) and the bankruptcy petition (issued on 2 March 1987) were served by substituted service; the debtor was made a bankrupt on 4 September 1987; the debtor applied on 9 September 1987 to set aside the bankruptcy orders on the grounds (i) that he had not been properly served with the bankruptcy notice and the petition and (ii) that the bankruptcy notice failed to comply with s. 5(1)(b) of the Bankruptcy Act: the adjudication and receiving orders were, by consent, set aside with costs on 27 October 1988; the costs were taxed on 3 August 1989 and 8 August 1989 at about $9000;

(3) on 2 June 1989, the debtor commenced an action in Suit No.1056 of 1989 against the creditors claiming damages for malicious prosecution in relation to the bankruptcy proceedings; he then applied for and on 4 August 1989 obtained an order ("the stay order") to stay execution and further proceedings on the judgment on the ground that he had a claim in the said action;

(4) on 5 August 1989, the creditor made the application under appeal in respect of the costs order on the ground that in view of the stay order it would not be equitable if the debtor were allowed to enforce the costs order against the creditor whilst the creditor was not allowed to enforce the judgment against the debtor.

The creditor's application was made under O. 45 r. 11 of the Rules of the Supreme Court read with O. 88A of the Bankruptcy Act. The said Rule reads as follows:

> 11 Without prejudice to O. 47 r. 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks fit.

The issue before me is whether the creditor's application comes within the terms of O. 45 r. 1. Counsel for the debtors says that the Court's power to make an order under that Rule is restricted to any matter occurring since the date of the relevant judgment or order against which relief is asked, which, if it had occurred on or before the date of the judgment or order, would or might have led to the grant of such relief. He founded his submission on the decision of *London Permanent Benefit Building Society v. De Baer* [1968] 1 All ER 372 where Plowman J defined the ambit of the corresponding English O. 45 r. 11 as follows:

> In my judgment, however, it is unnecessary for me to decide the question of inherent jurisdiction in the present case, because I have reached the conclusion that Rules of the Supreme Court, O. 45, r. 11, under which the present application is made, does not, on its true construction, confer any power to grant a stay of execution on an order for possession made in favour of a legal mortgagee or a chargee by way of legal mortgage.
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> The power conferred by that rule to grant relief is a power to do so, and I quote, "on the ground of matters which have occurred since the date of the judgment or order". It is, in my judgment, implicit in the rule that the matters referred to are matters which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order. (my emphasis).

Counsel for the debtor submitted the word "if" implies the possibility of the existence of the matter (which has occurred after the judgment or order) occurring before the date of the judgment or order. He also referred to the decision of Thean J in *Sal Leasing (Pte.) Ltd. v. Hendmaylex Pte. Ltd.* [1987] 2 MLJ 307 where Plowman J.'s interpretation of the said Rule was accepted and applied. In that case, the facts were as follows: the plaintiffs who were lessors of equipment had obtained a default judgment against the 1st defendant who was the lessee. Having repossessed and sold the equipment, the plaintiffs sued the guarantors for the balance due and applied for summary judgment. The defence of the guarantors was that on a proper computation of the claim in accordance with the terms of the lease, nothing was due. Concurrently, the 1st defendant made an application for an order that the judgment against him had been satisfied. This application was dismissed by the Registrar who also gave judgment against the guarantors. The lessee did not appeal, but the guarantors did and the judge allowed the appeal and gave them unconditional leave to appeal. The 1st defendant thereupon applied under O. 45 r. 11 for a stay of execution of the judgment against him pending the determination of the issue whether any part of the judgment remained unpaid. Thean J. held that if judgment had not been entered against the 1st defendant when the appeals of the guarantors were allowed, judgment could not have been so entered, or if a judgment had been entered on that day, a stay of execution would or might have been granted. He accordingly granted a stay.

I agree with Counsel for the debtor on his submission on the ambit of O. 45 r. 1. Accordingly, the only question I need to consider in this appeal is whether it was *possible* for the stay order to have occurred before the costs order so as to prevent the costs order being made, or if made, to lead to a stay of execution of the costs order. If it were possible for the stay order to have occurred at either of these points of time, the requirement of O. 45 r. 1 as explained by Plowman J would have been satisfied.

The stay order was applied for and obtained after the commencement of Suit No 1056 of 1989 which was commenced after the annulment of the bankruptcy orders. The stay order was granted by me not because of the fact of the annulment of the bankruptcy orders or the fact of the commencement of Suit No. 1056 of 1989 but because the debtor had in that action made a bona fide claim against the creditor for damages for maliciously commencing bankruptcy proceedings against him. The basis of the claim, assuming it is valid claim, existed from the date of commencement of the bankruptcy proceedings. The debtor cannot succeed in Suit No.1056 of 1989 unless he can prove the creditor's malice and the absence of a debt due by the debtor to the creditor at the commencement of the bankruptcy proceedings. In principle, there was nothing to prevent the debtor from commencing such an action at any time after the commencement of the bankruptcy proceedings (and of which he had knowledge) and before the bankruptcy orders were made against him in bankruptcy proceedings of which he had knowledge. If he had done so, he might have been able to rely on his claim for damages to support an application to stay execution on the judgment or to stay further proceedings on the bankruptcy petition. He might even have been able to apply to stay execution on the judgment, with the leave of the Court to apply to set aside the bankruptcy notice and/or the bankruptcy petition in order to remove the condition of this having technically committed an act of bankruptcy. In principle, I cannot see why the Court could not have given an order of stay of execution on this rather exceptional basis, but, it is not necessary to form a concluded view on this point, as it is within the realm of possibility that if the debtor had commenced Suit No. 1056 of 1989 before he was adjudged a bankrupt, he might have obtained a stay of further proceedings in the bankruptcy petition. In that event, the costs order would never have been made. In order words, the stay order would have prevented the making of the costs order. I should add that the stay order is not merely an order to stay the execution on the judgment but also all further proceedings on it.

For the above reasons, the test laid down by Plowman J and followed by Thean J has been satisfied. The appeal is allowed with costs here and below. There will be a stay of execution and all further proceedings on the costs order until the disposal of Suit No. 1056 of 1989 or further order.

Also found at [1990] 1 CLJ 657